



August 2, 2001

Ms. Kimberley Mickelson
Olson & Olson
Three Allen Center, Suite 3485
333 Clay Street
Houston, Texas 77002

OR2001-3367

Dear Ms. Mickelson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150252.

The City of Seabrook (the "city"), which you represent, received a request for nineteen categories of information relating to road and drainage issues. You indicate that the city does not have information responsive to categories 1, 2, 3a, 3b, 3d, 3e, 3h, 3i, 11, 12, and 15. We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). On the other hand, you indicate that the city has released some of the requested information to the requestor. You further indicate that the city has previously released some of the requested information to the public. We therefore assume that the city has also made this information available to the requestor. See Gov't Code § 552.007. However, you claim that some of the requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

We begin by noting that it appears you did not submit a representative sample of information for all of the information requested. Section 552.301(e) of the Government Code requires a governmental body to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Of the twelve categories of requested information you seek to withhold, you only submitted representative samples of information responsive to eight of the categories. You did not submit representative samples of information responsive to categories 5, 6, 7, and 10 of the request. In your correspondence accompanying the submitted representative samples of information, you indicate that you "were unable to copy all the records needed to be reviewed by" our office, but that a supplemental package of information would follow. This office did not receive any further information from you regarding this request. Thus, you did not comply with section 552.301(e) with respect to categories 5, 6, 7, and 10 of the request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Because you have not submitted information responsive to categories 5, 6, 7, and 10 of the request, we have no basis for determining whether a compelling reason exists for withholding such information. Thus, we have no choice but to order the information responsive to these categories released pursuant to section 552.302. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below. We caution that the distribution of confidential information constitutes a criminal offense. *See Gov't Code § 552.352.*

We next address your argument that the city is not required to examine its computer hard drives to ensure that all responsive e-mails have been retrieved. We note that the Act applies only to "public information" in existence at the time of the request for information. *See Gov't Code § 552.021; Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986). "Public information" is defined under section 552.002 of the Act as:

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). Public information may be recorded on various media, including "a magnetic, optical, or solid state device that can store an electronic signal." *Id.* § 552.002(b). Furthermore, "[t]he general forms in which media containing public information exist include ... a voice, data, or video representation held in computer memory." *Id.* § 552.002(c).

Computer software programs keep track of the location of files by storing the location of data in the "file allocation table" (FAT) of a computer's hard disk. The software then displays the file as being in a specific storage location. Usually, but not always, when a file is "deleted," it is not actually deleted, but the display of the location is merely shown to be moved to a "trash bin" or "recycle bin." Later, when files are "deleted" or "emptied" from these "trash bins," the data is usually not deleted, but the location of the data is deleted from the FAT. Some software programs immediately delete the location information from the FAT when a file is deleted. Once the location reference is deleted from the FAT, the data may be overwritten and permanently removed. To the extent an e-mail responsive to the instant request has only been placed in the "trash bin" or "recycle bin" of a program, the e-mail is still being "maintained" by the city for purposes of the Act and is still considered "public information." However, to the extent an e-mail responsive to the instant request has been deleted from the trash bin, and thus the location of the file on the hard drive has been deleted from the FAT, we believe the e-mail is no longer being "maintained" by the city and therefore the e-mail is no longer public information. *Id.* § 552.002(a).

The city's officer for public information carries the duty of promptly producing such public information when it is requested, unless the city wishes to withhold the information. *Id.* §§ 552.203, .221. If the city wishes to withhold the information, it must request a decision from the attorney general and submit to the attorney general, among other things, a copy or representative sample of the public information being requested. *Id.* § 552.301. Therefore, to the extent e-mails responsive to the instant request were still contained in a trash bin of a city computer program at the time of the request, the city was obliged to retrieve those e-mails and promptly make them available to the requestor or submit them to the Attorney General for a decision within fifteen business days of receiving the request. To the extent the city did not submit a representative sample of such e-mails for our review, we presume the city has made the e-mails available to the requestor. *See* Gov't Code § 552.021, .301, .302.

With respect to the information you submitted, we note that several documents in Exhibit 3F appear to consist of minutes from open meetings of the city council. Under section 551.022 of the Government Code, "[t]he minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative officer or the officer's designee." Therefore, you must release the submitted minutes in Exhibit 3F, which we have marked.

We also note that several of the submitted documents are subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate

Gov't Code § 552.022(a)(5). Portions of Exhibit 3F and all of the documents in Exhibit 4 are subject to section 552.022. Therefore, you must release this information unless it is confidential under "other law." You argue that this information is excepted from disclosure under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception and is not "other law" for the purpose of section 552.022. Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive section 552.103). Therefore, we find that you must release those portions of Exhibits 3F and 4 that are subject to section 552.022(a)(1) and (5). We have marked this information.

Next, we consider your section 552.103 argument with respect to the submitted information that is not subject to section 552.022. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under 552.103(a).

You indicate that the city is currently involved in a lawsuit with Seabrook Partners, Ltd. In support of this contention, you have submitted Seabrook's original petition in the case as well as the city's original answer and counterclaim. You indicate that the plaintiff claims that the city breached a previous settlement agreement in failing to construct a road. It appears the city counter-claimed, alleging that Seabrook breached the settlement agreement by failing to construct its portion of the road. Based on your arguments and our review of the submitted information, we agree that most of the submitted information relates to pending litigation. You may therefore withhold this information under section 552.103 of the Government Code. We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed.² We further note that you have not adequately demonstrated how some of the information in Exhibit 19 relates to the pending litigation; therefore, you may not withhold this information under section 552.103. See Open Records Decision No. 638 at 4 (1996).

With respect to the information in Exhibit 19 that you did not adequately demonstrate to be protected under section 552.103, we address your section 552.107 argument. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). Section 552.107(1) does not except purely factual information from disclosure. *Id.* Section 552.107(1) does not except from disclosure factual recounting of events or the documentation of calls made, meetings attended, and memos sent. *Id.* at 5. You indicate that "[t]here are a significant number of documents that the City believes fall within . . . the attorney client exception under § 552.107" However, you make no effort to explain

²The applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

how the information in question constitutes a client confidence or a communication of legal advice or opinion. Consequently, we find that you may not withhold the information in question under section 552.107, and you must release the information to the requestor. *See* Open Records Decision No. 589 (1991). We have marked this information in Exhibit 19, which is not excepted under either section 552.103 or section 552.107 and which you must release.

In summary, the city must release to the requestor information responsive to categories 5, 6, 7, and 10 of the request. The city must release the submitted minutes in Exhibit 3F, which we have marked, under section 551.022 of the Government Code. Likewise, the city must release certain marked portions of Exhibit 3F and all of the documents in Exhibit 4 under section 552.022. The city must also release the information we have marked in Exhibit 19, which is not excepted under either section 552.103 or section 552.107. The city may withhold the rest of the submitted information under section 552.103. Based on this finding, we need not reach the remainder of your arguments.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

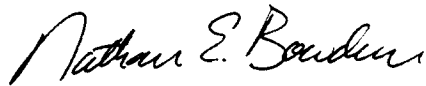
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 150252

Enc: Submitted documents

c: Mr. Ted McCollom
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(w/o enclosures)